IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 62.

JACOB SENKO,
Petitioner,

vs.

LaCROSSE DREDGING CORPORATION,
Respondent.

On Writ of Certiorari to the Appellate Court of the State of Illinois, Fourth District.

BRIEF FOR RESPONDENT.

HENRY DRIEMEYER,
322 First National Bank Building,
East St. Louis, Illinois,
Attorney for Respondent.

Of Counsel:

STUART B. BRADLEY,
135 South LaSalle Street,
Chicago 3, Illinois,

ROBERT BRODERICK,
322 First National Bank Building,
East St. Louis, Illinois.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 1-4477.

INDEX.

Authorities Cited.

Statutes Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 62.

JACOB SENKO,
Petitioner,

vs.

LaCROSSE DREDGING CORPORATION,
Respondent.

On Writ of Certiorari to the Appellate Court of the State of Illinois, Fourth District.

BRIEF FOR RESPONDENT.

QUESTIONS PRESENTED FOR REVIEW.

1) Is a dollar verdict of a jury immune from correction by a reviewing state court when that verdict is patently erroneous in reaching a conclusion which the law will not permit?

2) Can the general verdict of a jury amend the provisions of the Jones Act?

3) Can a coal miner and construction laborer, who receives his work assignment from a labor steward, who lives at home and commutes to the job site daily, takes his lunch to the job, is paid a laborer's hourly rate for 8 hours a day and 40 hours a week, and premium pay for other hours, all under a union labor contract, who works on a stationary dredge on non-navigable water, who has never been on the dredge when it was moved, and who is bumped by a job site superintendent while in a labor shanty on land kept for laborers, be held to be a member of a crew of a vessel because a jury determines he should recover money from his corporate employer?

STATEMENT OF THE CASE.

On November 5, 1951, respondent was engaged in dredging out Gabaret Slough which was to become a part of a canal then under construction in Madison County, Illinois. The slough ran more or less parallel to the Mississippi River and depending on the state of the water it connected at its ends with the river. The slough, although used for swimming, hunting and fishing, and by motor and row boats, had never carried any barges, excursion vessels or river commerce or traffic (R. 28, 75, 76, 83, 84). Respondent began dredging operations on the canal project in 1947 at a point north of Lock 27 (R. 41). In order to reach that area, Respondent's dredge had to "plow its way through" the slough because the depth of the water was insufficient to float the dredge. It was pushed by a small boat and at intervals of some 200 feet it was halted while it pumped mud and silt from the slough to make room for water to enable it to float (R. 27).

The dredging operations on the slough were done with a dredge, bulldozers, draglines, trucks and hand tools (R. 33, 146). The canal was not completed and opened to traffic until February 7, 1953 (R. 60).

On November 5, 1951, Respondent operated a dredge known as the James Wilkinson. It was, in fact, a barge on which a pump driven by a diesel motor was mounted. It could not move under its own power and was pushed or towed from place to place (R. 26). The dredge cut silt, sand or mud from beneath the surface of the water and pumped this material mixed with the water through pontoon lines to the land. This was done by a cutter-head and pumps operated by motors located on the dredge (R. 20, 21). This material when deposited on the bank was moved and shaped by trucks, draglines and hand tools (R. 33, 55).

The dredge Wilkinson was operated by an operator or lever man, engineer, oiler, and laborer (R. 17, 18). The operator handled the controls on the cutter-head and pumps, the engineer took care of the engines, the oiler oiled the machinery and the laborer (referred to by some of petitioner's witnesses as a deckhand) took tools, lanterns and supplies to and from the dredge to the land, cleaned up the dredge, filled the water cooler, and did miscellaneous jobs thereon (R. 17, 31, 32).

The operator, engineer and oiler were members of the Operating Engineers Union, a building crafts union (R. 25, 26, 29, 30). The laborer was a member of the Common Laborers Union (R. 47, 109). These employees were paid at a specified hourly rate and under contracts which respondent had with their unions, received premium pay for daily and weekly overtime hours (R. 30, 49). They signed no ship's papers before beginning work, did not live aboard the dredge, brought their own lunches, drove to and from work each day and required no training or license in navigation to qualify for and do their jobs (R. 49, 50, 30, 35).

The dredge had no "master," mate or pilot and neither Petitioner nor any other employee was "signed on" the

dredge (R. 113, 50). It was not self-propelled, had no sleeping quarters or facilities for preparing meals (R. 26, 30) and Petitioner and all other employees looked to Respondent and not the dredge or its earnings for their wages (R. 49).

Petitioner was 68 years of age. He lived at Mt. Olive, Illinois. He had been a member of the Laborers Union for nine years and worked for building contractors as a laborer on construction work near his home and elsewhere in Illinois (R. 110, 122). Before that he worked as a coal miner (R. 112). Because the construction job on which he had been working was completed he applied to the Laborer's Hall in Granite City for work and was sent to Respondent's job site on a "permit" issued by the Laborer's business agent at Granite City (R. 110). Although Mt. Olive is more than 40 miles from Granite City, Petitioner drove to and from his job each day. He did not belong to the National Maritime Union, the Marine Engineers Benevolent Association or the Master Mates and Pilots, which have jurisdiction over seamen (R. 112, 113). At times he worked on the land, driving stakes, cleaning mud from tractor treads and other similar jobs (R. 127, 128, 111). He worked under the jurisdiction of a "pusher" of the Laborer's Union, who assigned Petitioner and all other laborers to such jobs as they did for Respondent (R. 48, 113).

Senko was one of the laborers who was assigned by the "pusher" to work on the dredge Wilkinson (R. 48). He was subject to the direction of Respondent's Superintendent or Assistant Superintendent, who maintained an office at the job site. He began work at 3:30 P. M. and left at 11:30 P. M. (R. 51). He worked five days and 40 hours each week. He was paid $2.00 an hour and overtime each hour over eight in any day and 40 in any week (R. 111, 112). He had no duties of navigation to perform on or off the dredge. He was never on the dredge when it was moved

from one location to another (R. 115). At times he placed or lighted lanterns on stakes for the purpose of enabling the operator to see where to dig after dark (R. 32).

Respondent built a wooden shed or shelter at the request of the Laborer's Union which it kept at the job site opposite the dredge (R. 134, 128). The shed contained a coal stove and some benches around the walls. At about 10:45 P. M., on November 5, 1951, Senko left the dredge and took two lanterns to the shelter (R. 116, 117). The dredge was about 15 feet from the land (R. 116). Senko got to the door of the shelter as another employee was entering. The stove fire flashed up when this employee put the contents of a coal bucket into the stove. He turned to run through the shelter doorway and in so doing ran into and knocked Petitioner to the ground (R. 119).

Respondent paid compensation to Petitioner under the provisions of the Workmen's Compensation Act of Illinois for his lost time, as well as for his hospital and medical expenses (Def. Ex. B, R. 179). Thereafter, Petitioner filed a claim with the Industrial Commission of Illinois to recover compensation for disability which he claimed as a result of his injury (Def. Ex. B, R. 178, 179). At a hearing held before the Industrial Commission of Illinois on February 4, 1953, Petitioner stipulated that he and Respondent were operating under the provision of the Workmen's Compensation Act of Illinois on November 5, 1951 (R. 125, 126). Neither this stipulation nor the award made to Petitioner for his injury has been set aside.

To contrast the laborer's tasks of Petitioner to those of a member of a crew of a vessel, Respondent made uncontroverted proof of the working conditions and duties of seamen on vessels plying the Mississippi River and other navigable inland waterways on and prior to November, 1951. Such vessels were manned by pilots (masters), licensed engine room crewmen, unlicensed deckhands and

galleyhands (R. 140). The pilots belonged to the Master Mates and Pilots Union (R. 140). The engine room crewmen were members of the Marine Engineers Benevolent Association, and the deekhands and galleyhands belonged to the National Maritime Union (R. 141). Seamen must be able to splice lines and cables, operate winches, act as lookout, know navigation rules, understand navigation signals, buoy lights and running lights on approaching vessels (R. 141, 145), and be able to make up a tow consisting of as many as 18 to 20 barges. They must understand the placement of running lights on tows, operate bilge pumps and maintain searchlights in good working order (R. 141, 142). Seamen stand two watches a day of six hours on and six hours off duty (R. 143). They sign onto the vessel on which they work, live aboard, receive meals at the vessel's expense, have laundry facilities and are provided lounging quarters aboard the vessel to relax when off duty. They receive a monthly salary and are paid no overtime pay for hours worked in excess of 8 in one day and 40 in one week (R. 143, 144, 145)..

Petitioner, although required to be a member of a crew of a vessel to recover in this suit, neither possessed nor exercised any of the skills and abilities required of and exercised by members of a crew of a vessel. His work, skill, manner and amount of payment were those of a land-based laborer. He was injured while entering a shelter on land maintained there for him and other laborers. Although he now characterizes himself as a seaman he admitted at the trial "he didn't know what it was in the first place" (R. 168).

SUMMARY OF ARGUMENT.

I.

A jury's dollar verdict cannot make Petitioner a seaman when the uncontroverted facts of his duties and employment make it legally impossible for him to be a member of a crew of a vessel. Petitioner lived on land (R. 103). He worked on land and on a stationary dredge fastened to the bottom of a slough (R. 127, 128, 111). He was injured on land (R. 119). His Superintendent was officed on land. Petitioner drove 80 miles a day on land to and from work (R. 112). H had worked a lifetime as a coal miner and construction laborer (R. 110, 122, 112). He didn't consider himself a seaman and didn't know what it was (R. 168). He belonged to the laborer's union, worked on a labor union "permit" (R. 110), and under a labor union contract at $2.00 an hour, 5 days and 40 hours a week (R. 49). He had neither a seaman's duties, skills, nor risks.

II.

Petitioner was not a member of a crew. He was not on the dredge for the primary purpose of aiding in its navigation, for the dredge did not navigate. It had no means of propulsion and was attached to the bottom of the slough where it dug. Petitioner was never on the dredge when it was moved from one job site to another (R. 115).

The slough, when Petitioner was injured on November 5, 1951, was not navigable. It was never susceptible of or used as a highway for traffic or commerce until converted to a navigable canal on February 7, 1953 (R. 28, 76, 84). Absent such use the slough did not constitute navigable water. **The Daniel Ball**, 10 Wall. (U. S.) 557, 19 L. ed.

999, 1001; **Iowa-Wisconsin Bridge Company v. U. S.** (Ct. of Claims), 84 F. Supp. 852 (cert. denied, 339 U. S. 982, 94 L. ed. 1386, 70 S. Ct. 1020). The stationary dredge was neither in nor plying in navigable waters. Petitioner under such circumstance could not be a member of its crew. **Swanson v. Marra Brothers**, 328 U. S. 1, 90 L. ed. 1045, 66 S. Ct. 869; **Desper v. Starved Rock Ferry Company** (C. A. 7th), 188 F. 2d 177 (Aff'd 342 U. S. 187, 96 L. ed. 205, 72 S. Ct. 216).

III.

Petitioner worked on land and on the dredge. He was injured on land and entitled to, paid and awarded state workmen's compensation (Def. Ex. B, R. 179). His situation is unlike the claimants' in the cases he relies upon. In **Gianfala v. Texas Company**, 76 S. Ct. 141, and all cases cited therein, the accident occurred on vessels in navigable waters and not on land. Affirming Petitioner's non-seaman status will not deny the provisions of the Jones Act to all dredge workers.

IV.

The Jones Act adapts the Federal Employers' Liability Act to seamen. Under F. E. L. A., the court and not the jury decides whether or not the work is interstate. When the evidence establishes the interstate character of a shipment, neither a general verdict nor special finding will prevent this Court from so holding. **Baltimore & O. S. W. R. Co. v. Burtch**, 263 U. S. 540, 44 S. Ct. 165, 166; **Southern Pacific Company v. Gileo**, 76 S. Ct. 952, 962.

The court determines "seaman" or "non-seaman status." The jury finds the facts not the conclusions. **Desper v. Starved Rock Ferry Co.**, 342 U. S. 187, 72 S. Ct. 216. A jury finding of negligence is different from determining

the applicability of the Jones Act. The cases of **Lavender v. Kurn**, 327 U. S. 645; **Tennant v. Peoria & Pekin Union Ry. Co.**, 321 U. S. 29, and **Harsh v. Illinois Term**, 348 U. S. 940, simply hold that where there is evidence of defendant's negligence, the question is for the jury. This proposition has no application to the issue presented here of what law should apply and what status in law does Petitioner occupy. The record clearly shows Petitioner had a non-seaman status and this Court should so decide now that certiorari has been granted. **Reed v. Pennsylvania R. Co.**, 76 S. Ct. 958.

ARGUMENT.

The Facts Regarding Petitioner's Status Were Undisputed and the Appellate Court Was Required by Law to Enter Judgment for Respondent. Petitioner Was Not a Seaman.

Petitioner hopes to convince this Court that he is a seaman, a member of the crew of a vessel operating on the navigable waters of the United States. He says that the jury returned a general verdict for him and against his corporate employer, which verdict cannot be disturbed, the Jones Act, the Longshoremen's Act and the State Compensation Act to the contrary notwithstanding. He would try to convince this Court that a jury's dollar verdict makes him a seaman, although the facts of his duties and employment are uncontroverted and are contrary to all of the law, custom and tradition which defines a seaman member of a crew.

One will search in vain for anything nautical in the record of this case. The petitioner was bumped and knocked down by a fellow worker running out the door of a shelter on land maintained there for employees. Petitioner lived at Mt. Olive some forty miles distant from the job site and he commuted daily by automobile, as he had done during a lifetime of work in the building construction industry and in coal mining.

The pattern of his daily life would be about like this. He arises early, feeds the chickens, takes breakfast with his wife, gets into a car of a fellow laborer, stops by to pay his dues at the office of the laborers' union on his way to work. Arriving there he works as a handy man on a dredging job, partly on the dredge and partly on the bank of the channel being built as the dredge works ahead. He shifts discharge pipe and sets stakes on shore, cleans mud from treads of tractors, cleans the dredge, brings

coffee to the operator, carries tools, and runs errands to bring supplies to the job site. His boss is a Superintendent whose office is on land. Petitioner works a 40-hour week of five days at $2.00 per hour, plus overtime for any hours over 8 in a day or 40 in a week.

Petitioner Had Neither the Duties Nor the Risks of Seamen.

Is this the hardy life of the sea where iron men crew wooden ships? Where is the hazard of the tempest, of the coral reef and rock bound leeward shore? Where is the risk of collision in a fog, unless perhaps the smoke of pipe tobacco around the old base burner counts as such? It has been fairly said that being exposed to the same hazards anciently recognized as those of the sea may be an element to be considered. But there are no seaman's hazards here, nor any injury afloat, nor any captain, mate or boatswain to say go forward or go aft. The record is devoid of all those things which are the essence of life aboard ship: no boatswain, no forecastle, no captain, no log, no galley, no anchor, no watches to stand, no navigation, no master, no mate, no ship's company. Can we find a seaman in this nautical vacuum? Or even more difficult, a "member of the crew"?

The status of the Petitioner of course meant nothing to the jury, which made an award to a worker who sustained an injury from which he soon recovered. A jury of mid-west citizens could bring to bear no common experience of their lives to determine what is or is not a seamen or member of a crew on navigable water under the Jones Act, even if they had actually considered it.* We have here

* "The truth is (as anyone can discover by questioning the average man who has served as a juror) that usually the jury are neither able to, nor do they attempt to, apply the instructions of the Court. The jury are more brutally direct. They determine that they want Jones to collect $5,000.00 from the railroad company or that they don't want Nellie Brown to go to jail for killing her

a general verdict in favor of a worker who was covered by the State Workmen's Compensation Law, obtained a compensation award and who did not consider himself to be a seaman. That he is not a seaman is obvious to anyone who understands the meaning of that term under custom, usage or legal interpretation.

No Nautical Skills.

Let us consider the skills required of a seaman. They embrace navigation rules, knowledge of vessel lights, steering, standing of watches, serving as lookout, operation of winches, docking and undocking, manipulation of hatch covers, securing of gear for weather, handling of tows, and a myriad of other duties of which Petitioner never heard. It ordinarily involves living on board a vessel and moving about in navigation. It involves membership in seamen's unions and usually a license of some kind from the Coast Guard. Some seamanship may be read from books and perfected aboard ship, but even a casual look into the table of contents (or better still into the text) of "The American Merchant Seaman's Manual", Knight's "Modern Seamanship" or Rigsenberg's "Seamanship for the Merchant Service" is convincing that no skills taught therein are of the slightest use to the performance of the Petitioner's work. Those books teach men to be seamen.

Petitioner Was Not a Member of a Crew.

As decided by the Appellate Court in this case, it is apparent that by any ordinary test, Petitioner is not a seaman. But in order to recover under the Jones Act he must be even more than that, he must be "a member of a crew", one of that class of marine workers excluded

---

husband, and they bring in their general verdict accordingly. Ordinarily, to all practical intents and purposes, the Judge's views of the law might never have been expressed."

"Law and The Modern Mind," by Jerome Frank (1930), p. 172.

from the Longshoremen's Act, 33 U. S. C. A., Sec. 901 et seq. There is no doubt that Petitioner's work was local in character and the injury having occurred on land, he was not excluded from the benefits of the State Workmen's Compensation Law. In fact, Petitioner stipulated he was subject to that law. The Longshoremen's act was designed to provide compensation for such workers as Petitioner when their injuries occur on navigable water if they cannot recover state compensation. The effect of the Longshoremen's Act was to confine the benefits of the Jones Act to members of the crew of vessels plying navigable waters. **South Chicago Coal & Dock Co. v. Bassett,** 309 U. S. 251, 60 S. Ct. 544, 84 L. ed. 732; **Swanson v. Marra Bros.,** 328 U. S. 1, 66 S. Ct. 869, 90 L. ed. 1045. These and a host of other cases hold that a member of a crew of a vessel is one who is aboard for the primary purpose of aiding in its navigation. **Seneca Washed Gravel Corporation v. McManigal,** 2 Cir., 65 F. 2d 779; **Bound Brook,** D. C. Mass., 146 F. 160; **Anderson v. Olympian Dredging Co.,** D. C. Calif., 57 F. Supp. 827; and **Wilkes v. Mississippi River Sand & Gravel Company,** 6 Cir., 202 F. 2d 383 (cert. den. 346 U. S. 817, 98 L. ed. 344, 74 S. Ct. 28), are examples.*

---

* In *Wilkes v. Mississippi River Sand & Gravel Company*, the court in defining a "member of the crew" said, p. 388:

> "It would seem that the several tests under the Jones Act should be derived from the cases of *South Chicago v. Bassett*, supra; *Maryland Casualty Co. v. Lawson*, 5 Cir., 94 F. 2d 190; *A. L. Mechling Barge Line v. Bassett*, 7 Cir., 119 F. 2d 995; *Carumbo v. Cape Cod S. S. Co.*, supra; and as set forth in *Rackus v. Moore-McCormack Lines, Inc.*, D. C., 85 F. Supp. 185, namely, (1) *that the vessel be in navigation;* (2) *that there be more or less permanent connection with the vessel; and* (3) *that the worker be aboard primarily to aid in navigation.*" (Emphasis supplied.)

The Court in *Bound Brook* defined "crew", p. 164:

> "When the 'crew' of a vessel is referred to those persons are naturally and primarily meant who are on board her aiding in her navigation," * * *.

The Work Site Did Not Navigate.

Petitioner was not on board the dredge "primarily to aid in its navigation." It had no means of propulsion. It did not navigate. It moved earth through a pipe line securely attached to shore, and was fastened with spuds while it dug. It was never engaged in plying in navigable waters. In **Desper v. Starved Rock Ferry Company** (C. A. 7th), 188 F. 2d 177 (aff'd 342 U. S. 187, 96 L. Ed. 205, 72 S. Ct. 216), after referring to the opinion in **Swanson v. Marra Brothers,** 328 U. S. 1, 90 L. Ed. 1045, 66 S. Ct. 869, the Court said, p. 180:

> "This decision clearly demonstrates that, since the passage of the Longshoremen's Act, the Court has retreated from the position taken in the **Haverty** case **and has narrowed the Jones' Act concept of 'seaman' to the point where it includes only one who is a member of the crew of a vessel plying in navigable waters.**" (Emphasis supplied.)*

---

* To the same effect is *Finnie v. Pittsburgh Coal Co.*, 97 F. Supp. 721 (W. D. Pa., 1951), where the Court said, p. 722:

> "In the Swanson case, the court held that only members of a crew of a vessel *plying in navigable waters* could avail themselves of the Jones' Act, in view of the provisions of the Longshoremen's and Harbor Workers Compensation Act * * *." (Emphasis supplied.)

Webster's New International Dictionary, Second Edition, defines "plying," as:

> "To go or travel more or less regularly back and forth (between), as, the steamer plies between two cities."

The American College Dictionary contains this definition:

> "To traverse (a river) (etc.), esp. on regular trips.
> "To drive or run regularly over a fixed course or between certain places, as a boat, a stage (etc.)."

The Dredge Was Not on Navigable Waters.

Gabaret Slough had never been used as a "highway for commerce, over which trade and travel were conducted in the customary modes of trade and travel on water." Absent such use the slough did not constitute navigable water. In **The Daniel Ball,** 10 Wall. (U. S.) 557, 563, 19 L. Ed. 999, 1001, this Court defines navigable water as:

> "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or are susceptible of being used in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

In **Iowa-Wisconsin Bridge Company v. U. S.** (Ct. of Claims), 84 F. Supp. 852 (cert. denied 339 U. S. 982, 94 L. Ed. 1386, 70 S. Ct. 1020), it is stated, p. 866:

> "The rule in this country has been, and as far as we can tell, still is, that navigability is a fact which must be proved and the proof must consist of evidence that the watercourse in question is either used or is susceptible of use in its ordinary condition, as a highway of commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water. **The Daniel Ball,** 10 Wall. 557, 563, 19 L. Ed. 999."

The court added:

> **"The plaintiff has referred us to numerous cases and we have found others, in which sloughs, admittedly a part of navigable bodies of water, have been held not navigable themselves because they served no useful commercial service to the public."** (Emphasis supplied.)

The court concluded the sloughs, although joining the Mississippi River, were not "navigable waters" because, p. 867: "The sloughs have never served any useful commercial purpose."

All of the witnesses who testified to the use of the slough agreed it had never been used for trade, travel or commerce. Witnesses Sanders (R. 28), Skeen (R. 76) and Stevens (R. 84) each said no river traffic had ever traversed the slough and none had seen any barge, tows, excursion vessels, or, in fact, any vessel larger than a row boat, plying the slough at any time. It was never susceptible of or used as a public highway of transportation and it was not until after its conversion to a navigable canal that it became a navigable water. Petitioner was injured November 5, 1951. The canal was not completed until February 7, 1953 (R. 60). On November 5, 1951, the dredge Wilkinson was not on or plying on navigable waters of the United States. It was, in fact, floating in an artificial basin created in large part by its own work. As said in **Kibadeaux v. Standard Dredging Company** (C. A. 5th), 81 F. 2d 670, 672 (cert. den. 299 U. S. 549, 81 L. Ed. 408, 57 S. Ct. 11):*

---

* To the same effect are *Leovy v. United States*, 177 U. S. 621, 44 L. Ed. 914, 20 S. Ct. 797, *North American Dredging Co. of Nevada v. Hintzer*, (C. A. 9th), 245 Fed. 297, and *Harrison v. Fite* (C. A. 8th), 148 Fed. 781, 783, where it is stated:

"To meet the test of navigability as understood in the American law a watercourse should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs. It should be of practical usefulness to the public as a public highway *in its natural state and without the aid of artificial means.*

"* * * Mere depth of water, without profitable utility, will not render a watercourse navigable in the legal sense, so as to subject it to the public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. *To be navigable a watercourse must have a useful capacity as a public highway of transportation.*" (Emphasis supplied.)

"Indeed, injuries occurring on waters which are to become navigable after the dredge cuts the channel, but which have never been navigated before, could hardly be said to occur on navigable waters at all."

State Compensation Is Available.

During the past forty years, it has been the desire and intention of the Congress to give to workers whose duties were partly on land and partly on water the rights and remedies under the state compensation laws. These efforts were frustrated by the line of decisions which followed **Southern Pacific Co. v. Jensen,** 244 U. S. 205, 37 S. Ct. 524, as is clearly explained in **Davis v. Department of Labor,** 317 U. S. 249, 63 S. Ct. 225 (1942) at page 227. The same Congressional intent was manifested in the enactment of the Federal Longshoremen's and Harbor Workers Act, 33 U. S. 901 et seq., which is applicable only if compensation cannot be validly provided by state law. The dilemma of LaCrosse Dredging Company in defending itself through the courts is much like the dilemma of the employers referred to in the Davis case, LaCrosse having provided the required insurance under the compensation law of Illinois, but after an award was made and compensation paid, there was a complete change of position expressed in this effort to bring Petitioner within the letter of the Jones Act.

The Gianfala Case.

It was not without some moments of concern that we read the per curiam decision in **Gianfala v. Texas Company,** 76 S. Ct. 141. A longer look at the matter, together with a review of the cases cited in the opinion shows that it involved a situation quite different in fact and in law from the case at bar. The accident in the Gianfala case and in all of the cases cited therein occurred **on vessels**

in navigable waters, not on land as in the case at bar, the craft involved moved from place to place, and there were other factors giving rise to a disputed question as to the nature of the employment. Also, no brief was filed by respondent in opposition to the petition for certiorari. The decision in that case would not be authority for the proposition that if a stockbroker, pawnbroker or lawyer (or the most non-nautical person that can be conjured up) should be an employee of a vessel owner and be injured aboard ship, this Court would be bound by a jury's general verdict for him in a Jones Act case. Just because Gianfala was held to be a seaman is no authority for the proposition that Mr. Senko, the Petitioner, is such. No reasonable legal minds can differ in this Senko case; he is not a seaman. Petitioner's argument that to affirm the Appellate Court would deny the benefits of the Jones Act to all workers in dredge operations simply is not so. There are all manner of dredges and types of dredging work. There are dredges crewed like merchant ships. But such is not our case. Here we have a question somewhat analogous to the old "interstate" versus "intrastate" question under the F. E. L. A.

Under F. E. L. A. the Court and Not the Jury Decides Whether or Not the Work Is Interstate.

The first Federal Employer's Liability Act, enacted in 1906, was unconstitutional because it extended to employees engaged in intrastate commerce, whereas the power of Congress was limited to employment of an interstate nature. **Howard v. Illinois Central Railroad Co.**, 207 U. S. 463, 28 S. Ct. 141, 52 L. ed. 297. A new law was enacted in 1908, and as amended (45 U. S. C. A. 51, etc.) provides a cause of action and a remedy for employees of a carrier whose duties closely affect interstate commerce. Prior to the 1939 Amendment there was a long line of decisions recognizing that Congress intended to confine

the right and remedy to employees engaged in interstate commerce, e. g., **Illinois Central Railroad Co. v. Behrens,** 233 U. S. 473, 34 S. Ct. 646, 58 L. ed. 1051; and that the Act applied only when the carrier and the employee are both engaged in such commerce. **In re Second Employer's Liability Act Cases,** 223 U. S. 1, 32 S. Ct. 169, 56 L. ed. 327. Courts are constantly called upon to decide the scope of the Statute, whether each particular case is within or without the sometimes hazy line dividing interstate from intrastate commerce.

This Court and all courts have held uniformly through the long history of this branch of litigation that the ultimate determination of the laws applicability depending upon whether the man is engaged in interstate commerce is not decided by a jury, but by the Court. The cases on this subject are legion.*

The Court and not the jury determines the applicability of the law, despite the recognized fact that the right of jury trial is one of the substantial benefits afforded to an employee under the Act as compared to the rights of an employee covered by the Workmen's Compensation laws. And it is also clear that where the evidence establishes the interstate character of the shipment, neither a special

---

*New York C. R. Co. v. White, 243 U. S. 188, 37 S. Ct. 247 (1916);
Raymond v. Chicago, M. & S. & P. R. Co., 243 U. S. 43, 37 S. Ct. 268 (1917);
Illinois Central Railroad Co. v. Behrens, 233 U. S. 473, 34 S. Ct. 646;
Chicago & N. W. Ry. Co. v. Bolle, 284 U. S. 74, 52 S. Ct. 59 (1931);
Industrial Acc. Comm. of Calif. v. Payne, 259 U. S. 182, 42 S. Ct. 489 (1922);
Chicago & E. I. R. Co. v. Ind. Comm. of Illinois, 284 U. S. 296, 52 S. Ct. 151 (1932);
New York N. H. & H. R. Co. v. Bezue, 284 U. S. 415, 52 S. Ct. 205 (1932);
Southern Pacific Company v. Gilco, 76 S. Ct. 952 (June, 1956);
Reed v. Pennsylvania Railroad Co., 76 S. Ct. 958, 962 (1956).

finding nor general verdict will preclude this Court from so holding. See **Baltimore & O. S. W. R. Co. v. Burtch,** 263 U. S. 540, 44 S. Ct. 165 (166) (1923). As stated in **Southern Pacific Company v. Gileo,** 76 S. Ct. 952, at 962:

> "We hold that the petitioner, by the performance of her duties is furthering interstate transportation . . ."

"Seaman" or "Non-seaman" Status Is Determined by the Court. The Jury Finds the Facts Not the Conclusions.

The Jones Act (46 U. S. C. A. 688) provides that all statutes of the United States modifying or extending the common law right or remedy in cases of injury or death of railway employees shall apply to seamen, and thus adapts F. E. L. A. to seamen. In **Desper v. Starved Rock Ferry Co.,** 342 U. S. 187, 72 S. Ct. 216 (1951), this Court said, page 218:

> "'It is our conclusion that while engaged in such seasonal repair work, Desper was not a 'seaman' within the purview of the Jones Act. The distinct nature of the work is emphasized by the fact that there was no vessel engaged in navigation at the time of decedent's death. All had been 'laid up for the winter.'"

That decision is strictly in line with the decisions of this and all other courts in the railway cases that the applicability of the law, whether on account of interstate commerce (or status of the worker as a seaman or otherwise) is to be determined by the Court. Desper had been killed while working on a barge in navigable water. A jury returned a general verdict in favor of his administratrix, on which judgment was entered. The Court of Appeals held that a verdict should have been directed for the defendant and therefore reversed. This ruling was affirmed here.

A Jury Finding as to Negligence Is Different From Determining Applicability of the Jones Act.

Petitioner argues that there is a general unanimity of decision in allowing a jury's verdict to stand "except when there is a complete absence of probative facts to support the conclusion reached." The cases which Petitioner cites (**Lavender v. Kurn**, 327 U. S. 645, and **Tennant v. Peoria & Pekin Union Ry. Co.**, 321 U. S. 29, and **Harsh v. Illinois Term.**, 348 U. S. 940) involved a jury question as to defendant's negligence, and stand only for the well known proposition that where there is evidence of defendant's negligence, the question is for the jury. We do not quarrel at all with that proposition, but it has no application whatever to the issue before this Court, which is **what law should apply**, what status in law does the Petitioner occupy. There is no question of fact for a jury here; certainly no question on which reasonable minds could possibly differ. Even on questions of negligence, it has been long and firmly established in the law that a Court may direct a verdict where the evidence is undisputed or is so conclusive that the Court in the exercise of sound discretion would be compelled to set aside a verdict in opposition to it. **Southern Pacific Co. v. Pool**, 160 U. S. 438, 16 S. Ct. 338. And, of course, a court may direct a verdict for insufficiency of evidence **Galloway v. United States**, 319 U. S. 372, 63 S. Ct. 1077, particularly where as in the case at bar there is no room whatever for an honest difference of opinion as to the facts of Petitioner's status.

Petitioner Should Have His Compensation Award.

Neither the quality of mercy nor of generosity will be strained if this Court affirm the Appellate Court of Illinois. Petitioner will then receive his award under the Workmen's Compensation Law in a proceeding where he stipulated that the local law applied. He was there pro-

vided for regardless of negligence, furthering the humanitarian policy of the Compensation Acts. An attorney's afterthought was that perhaps Mr. Senko can be a seaman in the eyes of the jury. Thus arose this Jarndyce length litigation.

Petitioner did not have the hazards nor the life of a seaman. He argues that he did because as he says (Brief, p. 18), a dredge securely fastened to the ground and digging out a slough "is just as much in navigation as a cargo ship crossing the Atlantic." On this inaccurate premise he now asks this Court to remove him from the laborer status which he had to a seaman's status which he had not.

There was nothing maritime about Petitioner or his work. He was a land laborer who had non-navigation duties to perform both on and off a stationary dredge securely attached to the bottom of a non-navigable slough and who, while performing duties on land, was injured as he contends, because of Respondent's claimed negligence in operating a stove in a building on land.

This suit should never have been brought. This Court can and should decide this question of status, just as it decides pro or con the commerce question, now that certiorari has been granted. **Reed v. Pennsylvania R. Co.**, 76 S. Ct. 958.

CONCLUSION.

The law and the undisputed evidence made it necessary and proper for the Appellate Court to enter judgment for Respondent. It had no alternative. Its judgment was and is correct. It might have reversed the judgment for other reasons which Respondent urged and which it did not consider or decide because it concluded, as it was required to do, that Petitioner was not a seaman.

The judgment of the Appellate Court was and is correct and this Court should affirm it.

Respectfully submitted,

HENRY DRIEMEYER,
322 First National Bank Building,
East St. Louis, Illinois,
Attorney for Respondent.

STUART B. BRADLEY,
135 South LaSalle Street,
Chicago 3, Illinois,
ROBERT BRODERICK,
322 First National Bank Building,
East St. Louis, Illinois,
Of Counsel.